

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

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FILE: LIN 01 226 55947

OFFICE: NEBRASKA SERVICE CENTER

DATE:

JAN 13 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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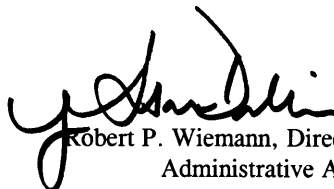
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contracting firm that specializes in re-roofing private residences and commercial buildings. The petitioner currently employs six persons and has a gross annual income of \$600,000. It seeks to employ the beneficiary as its construction manager. The director denied the petition because he found that the evidence failed to establish that the proffered position was a specialty occupation.

On appeal, counsel submits a brief and encloses copies of documentary evidence that has been previously submitted.

The procedural history in this proceeding has included: (1) the filing of a Form I-129 with additional supporting documents; (2) the director's issuing a request for additional evidence, which, in part, solicited evidence regarding the specialty occupation issue upon which the director would ultimately deny the petition; (3) the petitioner's response to the evidence request; (4) the director's denial; and (5) counsel's appeal.

This decision will first review major descriptive information presented by the petitioner about the proposed duties, because the particular duties are the critical factor in determining whether a proffered position qualifies as an H-1B specialty occupation.

On the Form I-129, the petitioner listed the proffered position as "Construction Manager," and for a nontechnical description of the position, stated, "Manages construction projects."

The petitioner's owner submitted a letter of support with the Form I-129, which described the proposed duties as follows:

In his position as Construction manager, [the beneficiary] will be responsible for organizing and planning construction jobs. He will be responsible for organizing cost analysis of the construction jobs. In addition [the beneficiary] will perform budget analysis and forecasting to assist us in market expansion and researching of potential future investments.

Counsel's cover letter to the Form I-129 and its associated documents provided this information about the general nature of the business in which the beneficiary would be involved:

[The petitioner] is a general contracting firm, specializing in re-roofing private residences and commercial buildings. Established in 1988, [the

petitioner] has over a decade of roofing experience with special expertise in hot tar roofs, torch down roofs, and composition shingles. [The petitioner's residential division specializes in year round re-roofs of single-family homes and multi-family rental units in King and Snohomish Counties. Our capabilities include removal or recovering of existing roofs and inspection of the wood structure beneath the roof to determine possible structural damage. On steep roofs, we specialize in asphalt composition shingles including three tab laminated dimensional and architectural torch down membranes. In addition, [the petitioner] can add skylights, vents or drains while re-roofing homes. [The petitioner] is insured, bonded and licensed.

The owner's letter of support stated that the petitioner's "staffing includes 5 roofers and 1 foreman."

Documents submitted in response to the director's request for additional evidence included a letter from the petitioner's owner which, in part, presented this information about the percentage of worktime that specific duties would require:

Percentage of time=75%

- Responsible for project/construction management on all commercial and residential jobs;
- Develop cost[-]effective plan for all projects;
- Plan and prepare scope of work; responsible for planning, control and satisfactory completion of each project;
- Prepare conceptual drawings and material submittals;
- Prepare budget and schedule of values;
- Manage contractors and roofing employees;
- Attend pre-job meeting with other project/construction managers, field superintendent and safety coordinator;
- Prepare percentages for billing operation;
- Analyze job cost/charts;
- Analyze structural modifications and repairs that may be needed for existing or new structure;
- Purchase and schedule materials;

- Keep company informed of engineering upgrades in industry;
- Evaluate and implement new technologies in construction industry;
- Prepare monthly reports of all activities to owner of the company.

Percentage of Time=25%

- Develop growth plan for company, including strategies for growth in new markets

At the time the director issued his denial, the record included the following documentary evidence especially relevant to the specialty occupation issue:

1. A selection of "Invoices of current business/industrial clients," submitted as evidence of the complexity of the proffered position;
2. An "Invoice Register," submitted as "reflecting [the] current customer list (to 12/31/01);
3. Federal tax return information, which, counsel asserts, shows that the petitioner "has been steadily acquiring more clients and larger commercial projects" and so needs a construction manager.
4. Roofing journal advertisements for employment in the industry.
5. "Websites of roofing companies in different locations within the United States - showing that Project Managers with extensive experience (well over equivalency requirements) and/or bachelor's degree is normal to the industry";
6. An University of Cincinnati Internet document about its degree offerings in Construction Management and the employers of recent Construction Management graduates.
7. The Internet version of the Department of Labor's (DOL) *Occupational Outlook Handbook* (Handbook) section on construction managers; and
8. A DOL "O*Net online Snapshot Worker Requirements" document on construction managers.

Counsel's brief maintains that, contrary to the director's decision, the proffered position is a specialty occupation.

Counsel asserts that the documentation heretofore submitted establishes that a bachelor's degree requirement is necessary for the proffered position, and that the degree requirement is also common in the petitioner's industry for positions that are parallel to the proffered position in organizations similar to the petitioner's. Counsel asserts also that evidence of the specialty occupation nature of the proffered position is in the University of Cincinnati information about its Construction Management degree program. Counsel further maintains that the specialty occupation contention is further bolstered by the *Handbook's* information about universities offering baccalaureate and masters degrees in construction management and construction science.

Counsel also maintains that the director overlooked evidence favorable to the petitioner on the degree-standard issue, namely, Internet documents showing the educational background and work experience of construction management personnel.

Counsel also contends that the director misinterpreted the *Handbook's* information. In addition, counsel calls attention to the fact that the director "failed to address the O*Net Snapshot Experience for Construction Managers," and counsel notes, "The SVP Range for Construction Manager is 7.0<8.0 and the Education is stated as most require a four[-]year bachelor's degree. (See *Response to RFE[.]*)" Counsel also asserts that, as the owner indicated in a previous submission, a person with a civil engineering degree is considered a "business necessity" because an engineering background is "critical in evaluating structural abnormalities in existing roofs," as the petitioner is acquiring more commercial projects.

Section 214(i)(1) of the Immigration and Nationality Act 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The AAO applied these evidentiary principles in its consideration of the record, and they should be regarded as incorporated into the discussion of each regulatory criterion.

1. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As this burden never shifts, the petitioner is solely responsible for compiling a persuasive record.
2. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

3. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Before discussing the evidence of record, it is worth emphasizing this point which is critical to the AAO's decisions in this proceeding: Citizenship and Immigration Services (CIS) consistently and correctly interprets "degree" in 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), specifies that a "specialty occupation" is one that requires not only the theoretical and practical application of a body of highly specialized knowledge, but also attainment of a bachelor's degree or higher, or the equivalent, in "the specific specialty." Thus, the required degree must be in a specific specialty that contains a body of highly specialized knowledge that is necessary for performance of the proffered position. The definition of specialty occupation at 8 C.F.R. § 214.2(h)(4)(ii) mirrors the Act by stating that the required degree must be in "a specific specialty." Thus, CIS correctly interprets "degree" in all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) as one in a specific specialty that is directly related to the proffered position. This is a reasonable interpretation that is consistent with section 214(i)(1) of the Act. See *Tapis International v. INS*, 94 F. Supp. 2d 172, 175 (D. Mass. 2000).

As the following discussion will show, the evidence does not satisfy any of the H-1B specialty occupation criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

**I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1) .**

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) for its authoritative information about particular occupations' duties and educational requirements. Here, the AAO consulted the 2002-2003 edition, and, like the director, found that the duties of the proffered position substantially comport with those of the construction manager occupation, addressed at pages 37-39. Contrary to counsel's perspective, the *Handbook* indicates that this occupation does not normally require a bachelor's degree in any specific specialty. Here are the most decisive paragraphs, from pages 38 and 39 of the *Handbook*:

Persons interested in becoming a construction manager need a solid background in building science, business,

and management, as well as related work experience within the construction industry. They need to understand contracts, plans, and specifications, and to be knowledgeable about construction methods, materials, and regulations. Familiarity with computers and software programs for job costing, scheduling, and estimating also is important.

Traditionally, persons advance to construction management positions after having substantial experience as construction craftworkers-carpenters, masons, plumbers, or electricians, for example-or after having worked as construction supervisors or as owners of independent specialty contracting firms overseeing workers in one or more construction trades. However, employers - particularly large construction firms - increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering. Practical industry experience also is very important, whether it is acquired through internships, cooperative education programs, or work experience in the industry.

Construction managers should be flexible and work effectively in a fast-paced environment. They should be decisive and work well under pressure, particularly when faced with unexpected occurrences or delays. The ability to coordinate several major activities at once, while analyzing and resolving specific problems, is essential, as is an understanding of engineering, architectural, and other construction drawings. Good oral and written communication skills also are important, as are leadership skills. Managers must be able to establish a good working relationship with many different people, including owners, other managers, designers, supervisors, and craftworkers.

Advancement opportunities for construction managers vary depending upon an individual's performance and the size and type of company for which they work. Within large firms, managers may eventually become top-level managers or executives. Highly experienced individuals may become independent consultants; some serve as expert witnesses in court or as arbitrators in disputes. Those with the required capital may establish their own construction management services, specialty contracting, or general contracting firm.

Whether the director misspoke about the role that experience plays in a construction manager's career is unimportant. The most relevant impact of the comments in the above paragraphs about

experience and educational credentials is that employers for construction manager positions do not normally, usually, or as a matter of course require a bachelor's degree or higher, or the equivalent, in any specific specialty.

The fact that "employers - particularly large construction firms - increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering" does not establish that employers normally require a bachelor's degree or higher in even the three specialties mentioned. In this regard, at the time of filing the Form I-129, the petitioner was a small firm (five roofers and one foreman), and therefore not one where the growing preference is "particularly" noticeable.

As counsel notes, the *Handbook* does, indeed, indicate that "substantial experience" is an important factor for advancement to a construction management position. However, the AAO does not agree with counsel's assertion to the effect that this "bolsters the applicant's position." While counsel asserts that 12 years of experience "would be the equivalent of a bachelor's degree," there is no evidence that the *Handbook's* statements assume or are meant to be qualified by any such equivalency. Furthermore, counsel does not support his assertion with independent documentary evidence.

Contrary to counsel's insistence, the fact that universities offer bachelor's and higher degrees in disciplines like Construction Science and specific specialties like Civil Engineering has little evidentiary weight. These degree offerings certainly reflect the relevance of certain degrees to the proffered position, but, even with all the other submissions in the record, they do not establish that such degrees are a necessary prerequisite for performing the duties of the proffered position.

The information in the "Snapshot Workers Requirements" on construction managers is inconsequential. Counsel appears to rely on the SVP Range of 7.0<8.0 as an indication that most construction manager occupations require a four-year degree. Close reading of the information indicates, however, that the "Snapshot" does not state that most construction management positions require a four-year degree. It actually relates that the construction manager occupation is in a "job zone" (Job Zone Four) where most of the occupations, but not all, require a four year degree. This is an inconclusive statement about the educational requirements for the construction management occupation. Furthermore, even if read as counsel reads it - which would be incorrect - the statement offers no indication about whether acceptable degrees would be limited to those in specific specialties.

Counsel's contention that the situation here is analogous to the

one in *Tapis International v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) is incorrect. Unlike *Tapis*, the record does not establish a situation where a combination of a bachelor's degree in a limited number of fields and specialized experience is necessary for the performance of the proffered position. The *Handbook* only indicates a growing preference, not a standard prerequisite, for construction experience and a bachelor's degree in one of several fields. Furthermore, an employer's "preference" does not establish what job performance requires.

The petitioner has not met the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

A. Degree requirement common to the industry.

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As earlier indicated in this decision, the *Handbook* does not convey that there is an industry-wide degree standard. While the *Handbook* indicates that "employers - particularly large construction firms - increasingly prefer" persons with a construction background and a bachelor's degree in civil engineering, construction science, or construction management," it also states, "Traditionally persons advance [present tense] to construction management positions after having substantial experience as construction craftworkers . . . construction supervisors, or as owners of independent specialty contracting firms overseeing workers in one or more construction trades."

It must also be noted that the *Handbook* qualifies its comment about the growing preference by the phrase "particularly large firms," which indicates that the growing preference is particularly seen in smaller construction firms. Certainly, at the time of filing the Form I-129, the petitioner was a small firm (five roofers and one foreman).

The AAO's first observation about the employment advertisements in the roofing journals is that the scant information provided

about the advertising companies and the specific duties of the position is insufficient to establish that the advertised positions are parallel to one proffered here. In any event, these advertisements are too few to establish an industry-wide standard. Furthermore, the advertisements are not inconsistent with the *Handbook's* information about some firms preferring a combination of experience and a bachelor's degree in civil engineering, construction science, or construction management.

The Internet documents about other roofing companies advertisements provide no support to the assertion that that a bachelor's degree or higher in a specialized area is a common requirement in the petitioner's roofing construction industry. In fact, the profiles of the vast majority of the profiles of roofing-management employees make no mention of a bachelor's degree or higher in any discipline.

B. Degree necessitated by the complexity or uniqueness of the position.

Upon review of the entire record, including but not limited to the duty descriptions, the records pertaining to work performed and the customers served, tax records, and the letters from counsel and the owner, the AAO finds that the proffered position is neither especially complex nor unique. It comports with the type of position one would expect within the *Handbook's* construction manager occupation, which does not require a bachelor's degree or higher, or the equivalent, in any specific specialty.

The director was correct in not granting the petition under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3) .

The petitioner indicated that this is the first time the proffered position has been offered.

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 214.2 (h) (4) (iii) (A) (4) .

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's degree or higher in civil engineering or any other specific specialty. Rather, the requisite knowledge appears to be within the range of on-the-job experience in roofing construction projects.

Accordingly, the record does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussions above, the petitioner has failed to establish any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A). Thus, the director's decision should not be disturbed.

Again, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361, *supra*. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.